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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

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In the Matter of)

Telecommunications Services)
Inside Wiring)

CS Docket No. 95-184

Customer Premises Equipment)

In the Matter of)

Implementation of the Cable)
Television Consumer Protection)
and Competition Act of 1992:)

MM Docket No. 92-260

Cable Home Wiring)

Comments of CableVision Communications, Inc.,
Classic Cable, Inc. and
Comcast Cable Communications, Inc.
on the Further Notice of Proposed Rulemaking

Terry S. Bienstock, P.A.
Philip J. Kantor, Esq.
Bienstock & Clark
First Union Financial Center
200 S. Biscayne Boulevard, Suite 3160
Miami, FL 33131
Telephone: 305-373-1100
Facsimile: 305-358-1226

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EXECUTIVE SUMMARY

The Commission initiated the rulemaking in this Docket to address issues concerning the disposition of inside wiring with respect to multiple dwelling units ("MDUs"). CableVision Communications, Inc., Classic Cable, Inc. and Comcast Cable Communications, Inc. (hereinafter "CableVision," "Classic," "Comcast," and sometimes collectively referred to as the "Cable Operators"), as providers of cable television services, have a substantial interest in providing such services to residents of MDUs and will certainly be affected by the outcome of this proceeding.

The Further Notice of Proposed Rulemaking ("*Further Notice*") tentatively concludes that new procedural mechanisms should be adopted that will provide certainty regarding use of the "home run" wiring in MDUs (which runs from the point at which the wiring becomes dedicated to serving an individual subscriber to the demarcation point) upon termination of service. Additionally, the *Further Notice* proposes to modify the cable home wiring rules so that they will operate in harmony with the proposed procedures for home run wiring.

CableVision, Classic and Comcast believe that the proposed rules and tentative conclusions set forth in the *Further Notice* will not achieve the goals and objectives that Congress has set out in the Telecommunications Act of 1996, including the maximization of consumer choice and competition in the marketplace. The Cable Operators believe that the unfortunate end result of the Commission's proposed rules will be that although the provider of service to an MDU building may change from the incumbent cable operator to an alternate provider of service, the tenants of that MDU will have no greater choice in the provider of their multichannel video services. The only winner as a result of these proposed rules is the MDU owner whose role as gatekeeper

will be strengthened, and who will be able to continue to demand and receive up-front lump sum payments or revenue sharing from multichannel video programming distributors ("MVPD").

The key reason that CableVision, Classic and Comcast contend that consumer choice will not be increased is that the rules proposed by the Commission fail to take any action on such critical issues as continued access for franchised cable operators, the restraint of long-term (in excess of ten years) exclusive agreements between MDU owners and alternate providers that are entered into once the MDU owner terminates the incumbent provider's access rights, and revenue sharing or up-front payments in exchange for exclusive access. The Cable Operators believe that the most important issue in this rulemaking is access to private property. Without gaining access to private property, franchised cable operators will not be in a position to provide individual consumer choice for the multitude of services that technological convergence will bring. In turn, the lack of access will prevent cable operators from fully competing in the broadband service marketplace, reduce competition and even raise prices. CableVision, Classic and Comcast believe that the FCC should adopt a regulation interpreting the access provision in the Cable Communications Policy Act (hereinafter "CCPA") that would authorize a franchised cable operator to apportion an easement already used by another utility whether or not the grantor of the easement concurs in its use by the cable operator.

Only by addressing these issues will the FCC implement the type of change that will allow for the facilities-based competition that the Telecommunications Act of 1996 was intended to foster. CableVision, Classic and Comcast assert that the Commission should expeditiously resolve the access and exclusivity issues raised in order for this rulemaking to have any meaningful effect on the consumer in the real world.

The Cable Operators acknowledge that MDU owners have a legitimate interest in protecting the integrity, aesthetics and safety of property. However, the Commission is being terribly naive if it fails to recognize or acknowledge that MDU owners are demanding large cash payments for access to their property and preferring exclusivity as the *quid pro quo*. Enhancing the power of MDU owners will do nothing to enhance the choices available to the consumer, the one who actually receives, watches and pays for the multichannel video service. That available revenue stream is the reason that there will not be head-to-head, unit-by-unit competition between MVPDs in the MDU arena, and the Commission's response to the *Further Notice* must not overlook addressing that issue.

It appears that the factual underpinning for the proposed rules is that they will enhance consumer choice. The facts in the marketplace belie that proposition. These rules will not create any choice for individual consumers, but will merely solidify the MDU owners' role as "gatekeeper" and enhance their ability to extract fees for access, which costs will then be passed on to their tenants.

Finally, with respect to the competitive landscape as it presently exists, CableVision, Classic and Comcast believe that the Commission has misinterpreted and improperly reacted to many of the actions taken by cable operators in response to MDU owners' and/or alternate providers' attempts to terminate the cable operator's right to continue to maintain home wiring on the premises against the owner's wishes and to take over the use and ownership of the home wiring and other related equipment. While the Commission apparently deems any response by the incumbent cable operator as anti-competitive, usually the cable operator is only protecting the integrity of its contract that the MDU owner previously entered into with the cable operator. In numerous cases, courts have upheld the incumbent operator's right to continue to serve the tenants of an MDU and

to maintain ownership of the home wiring and other related cable equipment on the premises. The operators fail to understand how an attempt to protect the integrity of one's contract and property or the assertion of statutory right can be viewed as anti-competitive activity.

CableVision, Classic and Comcast agree that it is appropriate for the Commission to leave the cable demarcation as presently designated. While the Cable Operators do not challenge the proposal that a MDU owner should be given the right to purchase the home wiring should one or more of its tenants decline to do so, just compensation must be more than simply the replacement value of that wiring. In order to better equalize opportunities, CableVision, Classic and Comcast propose that just compensation for the purchase of the home wiring must be equal to what it actually would cost the MDU owner or the alternate provider to install that home wiring were it required to install a second line. The formula must include the material and labor costs. If not, the Commission will simply be providing the alternate provider with a subsidy for being a late-comer.

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on the Further Notice of Proposed Rulemaking

Pursuant to 47 C.F.R. §§ 1.415, 1.419, CableVision Communications, Inc., Classic Cable, Inc. and Comcast Cable Communications, Inc., through their attorneys, file the following comments in the above-captioned proceeding.

CableVision Communications, Inc. (hereinafter "CableVision") is a multiple system manager of cable systems throughout the United States. The systems CableVision manages serve approximately 320,000 subscribers, many of which are located in multiple dwelling units (hereinafter "MDUs"). Classic Cable, Inc. (hereinafter "Classic") serves

approximately 170,000 subscribers located in 8 states, and many of its subscribers are residents of MDUs. Comcast Cable Communications, Inc. (hereinafter "Comcast") owns, manages and serves 4.3 million subscribers in 21 states and many of its subscribers also reside in MDUs. CableVision, Classic and Comcast, as providers of multichannel video services, have a great interest in providing service to subscribers within MDUs and will be affected by the outcome of this proceeding.

I. Introduction

In 1992, Congress enacted the Cable Television Consumer Protection and Competition Act (hereinafter "1992 Cable Act").¹ Section 16(d) of the 1992 Cable Act, 47 U.S.C. § 544(i), mandates the FCC to "prescribe rules concerning the disposition, after a subscriber terminates service, of any cable installed by the cable operator within the premises of such subscriber."

In this docket, the Commission issued initial regulations establishing a demarcation for inside wiring as that point twelve inches outside of where the cable wires enter the subscriber's premises. 47 C.F.R. § 76.5(mm)(1-2). The demarcation point for MDUs is the same except that it is measured not from the point that the wiring enters the premises in general, but from the point the wiring enters each individual subscriber unit. *Id.* Any wiring² inside the demarcation point is considered inside wiring and subscribers are eligible, upon voluntary termination of service, to purchase that wire at cost. 47 C.F.R. § 76.802.

¹ Pub. L. No. 102-385, 106 Stat. 1460 (1992) (codified, as amended at 47 U.S.C. §§ 521-59).

² The Commission's order on reconsideration in this docket added passive signal splitters to the definition of inside wiring. MM Docket No. 92-260, First Order on Reconsideration, slip op. at ¶¶ 37-38 (hereinafter "Recon. Order").

The Commission's rules do not apply in certain circumstances: 1) if the wiring were installed by someone other than the cable operator or its contractor; 2) if the wiring is treated under state law as a fixture; 3) if the operator treats the wire, for tax purposes, as owned by the subscriber; and 4) if the inside wiring is a loop-through configuration utilized in MDUs. While the exclusions appear to be self-explanatory, the application of the Commission's rules in real world settings, particularly with respect to MDUs, created much confusion for CableVision, Classic and Comcast, as well as other cable operators.

A number of wireless cable operators, satellite master antenna television system owners (SMATVs), and telephone companies petitioned the FCC to reconsider its original decision in this docket. These entities requested that the Commission modify the demarcation point in order to give multichannel video program distributors (MVPDs) other than the incumbent cable operator greater access to wiring. The Commission rejected these petitions for reconsideration ostensibly because the record did not support modification.

Nevertheless, the FCC believed that the alternate MVPDs raised valid points. The Commission instituted this FNPRM in order to receive comments on its tentative conclusion that new procedural mechanisms should be adopted that will provide certainty regarding the use of the "home run" wiring in MDUs upon termination of service.

II. The Commission's View of the Competitive Landscape Is Inaccurate

A. MDU Owners Refuse Installation of Second Wires In Order to Obtain Large Cash Payments from MVPDs

The FCC notes that one problem in providing full competition for residents of MDUs is "that property owners routinely insist that a competitor to the incumbent cable operator may only provide service to the consumers residing in the MDU if the competitor

uses the existing wiring within the building.” FN at ¶¶ 11, 25, n.68, 26.³ The FCC finds that “[t]he record indicates that MDU property owners often object to the installation of multiple home run wires in the hallways of their properties, for reasons including aesthetics, space limitations, the avoidance of disruption and inconvenience, and the potential for property damage. According to the ICTA, “[v]irtually all property owners refuse to allow installation of a second set of separate cable wires . . . [because] . . . [p]ost-wiring a building generally negatively impacts the appearance of the property because [the wiring] cannot be hidden without tampering with the structure of the building.” FN at ¶ 25.

It appears that the FCC has accepted the plausible explanation that aesthetic concerns are the reason facilities based competition has not developed in the MDU market. The real reason is much simpler — money. MDU owners routinely seek cash payments and/or a percentage of revenues in consideration for long term — 15 to 20 year — exclusive contracts. Allowing or advancing facilities-based competition would diminish the ability of MDU owners to extract this type of payment. Consequently, it is in both the MDU owners’ and the alternative providers’ financial interest for this Commission to continue to believe the unsupported claim that MDU owners will refuse to allow the installation of a second wire on the MDU premises.

The Commission need not go beyond the MDU owners and the industry’s own statements to realize the true motivation for the proposed rules — and that they have no bearing on consumer choice:⁴

³ Hereinafter references to the *Further Notice* will be cited as “FN at ¶ ____”.

⁴ The articles are attached as an Appendix hereto and are referred to as “Appendix (continued...)”

- As recently as two days ago, Business Week described one MDU owner's quest "to generate extra money from his properties by using his powerful economies of scale to secure better rates on telephone, cable, and other services, and then pass them on to tenants — for a small fee, of course." Appendix at Tab 1.

- The provision of services such as cable by MDU owners for its revenue stream is "going to rival what you'll collect in rent after awhile." Appendix at Tab 7.

- "With some savvy research, preparation, and negotiation it is possible to gain substantial profits from cable revenue sharing. This revenue is compared to "finding and drinking from this modern day Holy Grail." Appendix at Tab 10.

- "Technology presents property owners and managers with unprecedented revenue opportunities. Property owners today have the opportunity to become the gatekeepers..." Appendix at Tab 15.

- "More and more property owners are starting to look at leveraging their gateway," referring to cable and other telecommunication services. Appendix at Tab 5.

Nowhere in the numerous articles and literature attached is there any mention of tenant choice, aesthetics of multiple wires, or any of the underpinnings for the Commission's proposed rules.

Again, the reality of the marketplace demonstrates that the gatekeeper role precludes tenant choice in order to promote revenue sharing — which is precisely the admitted marketing plan of alternate providers.

⁴(...continued)
at Tab ____."

- “In return for signing 10- to 20-year contracts with the [alternate] companies, apartment developers usually receive between 4 to 6 percent of the gross profit from the phone and cable companies.” Appendix at Tab 14.

- “Apartment owners with private cable systems also consider them a revenue generator. Many private operators offer apartment owners a percentage of the revenue made from cable TV services or an upfront fee to give the private operator the exclusive business.” Appendix at Tab 19.

Actual MDU agreements already provided by the undersigned demonstrate the nature of the deals made by alternate providers:⁵

- People’s Choice TV of St. Louis: Paragraph 8 of its *Exclusive Video Programming Service Agreement* is specifically entitled “Termination of Current Provider and Owner Compensation”, and sets forth, in part, a “schedule for the termination of the current SDS [Signal Distribution Service] provider and payment of Owner compensation.” The Agreement further provides for People’s Choice to pay Owner \$10,000 within one week of the execution of the agreement and “[w]hen the current SDS provider has been terminated and there is no other SDS provider at the Property, Operator shall pay within one week to Owner Twenty-Five Thousand Dollars (\$25,000.00).” Finally, paragraph 9 of the Agreement provides that the Agreement will “run for twenty (20) years.” (Presentation at Tab 1).

- Heartland Wireless Communications, Inc.: The owner of a 70-unit MDU in Lubbock, Texas would receive 10 percent of receipts per year in shared revenue.

⁵ Copies of the contracts discussed directly below are contained in the *ex parte* presentation made with respect to MM Docket 92-260 on behalf of Comcast Cable Communications, Inc. by Philip J. Kantor on January 23, 1997. Hereinafter, that presentation will be referred to as “Presentation at Tab ____.”

The agreement also provided for a ten-year term with a five-year option after the ten years.
(Presentation at Tab 3).

- TVMAX Telecommunications, Inc., a wholly owned subsidiary of OpTel, Inc.: Its typical agreement provides for exclusivity, a term of 15 years "and shall be automatically renewed for an additional five (5) year period⁶ unless COMPANY is in material breach." OpTel typically also provides for Payments or Compensation to the owner of the MDU. In those situations where it has not entered into a bulk arrangement with the owner, OpTel will give up to 10 percent of revenue, depending on the percentage of units receiving service. (Presentation at Tab 4).⁷

- Charlottesville Quality Cable: Notwithstanding the Residential Landlord and Tenant Act of the State of Virginia, Va.Code Ann. § 55-248.13:2, proscribing payments by cable providers to landlords "in exchange for giving tenants ... access to [cable] service," Charlottesville Quality Cable entered into an agreement with an owner of several MDUs which provided it with exclusivity in exchange for the payment of 12 percent of revenues as a "consulting fee," which was found to be in violation of the Virginia Code. (Presentation at Tabs 9 and 10).

⁶ The long term exclusive agreements that the alternate providers require as a condition to providing service and compensation to MDU owners appears to be contrary to what one of their ranks has told a court. In a dispute with Comcast in Little Rock, Arkansas, American Telecasting, Inc. ("ATI") has told a state court that it "need[s] to have exclusive access to the properties they serve for *some limited period of time* to ensure that they will recoup their investment." (Presentation at Tab 6). ATI's contract is for five (5) years. However, as shown above, most alternate providers demand exclusive terms of 15 to 25 years, clearly not a "limited period of time".

⁷ These sample agreements also demonstrate that the alternate providers routinely insert an "ownership of wiring" provision identical to those used by cable operators and complained of in these proceedings.

It is obvious that MDU owners would not be making the claims of “aesthetics, space limitations, the avoidance of disruption and inconvenience, and the potential for property damage” if they were not receiving payments for the exclusive long-term agreements with alternate providers. Instead of alternate providers paying to install their own home run wiring, the FCC proposes to allow alternate providers to continue to use that money for payments to MDU owners. Thus, the result of these rules will be that the situation will go from an MDU building with *one* franchised cable operator providing service to the residents to *one* alternate provider who receives a subsidy (by not having to spend upfront capital on home runs) and the MDU owner receiving another revenue stream.

The Cable Operators are aware of numerous examples of alternate providers completely post-wiring and placing distribution systems that are fully parallel to the existing distribution system installed, maintained and owned by the incumbent cable operator within MDUs. In one of CableVision’s franchise areas, Miami Beach, it is aware of one large high-rise MDU, containing in excess of 1,270 residential units, where an alternate provider completely post-wired the building. Because CableVision’s access rights to the building have not been terminated since the contractual term has not expired, the two MVPDs are competing unit-by-unit. Congress’ goal to increase competition and to allow individual MDU residents a choice between franchised cable operators and various alternate providers of service will **never** occur should the FCC adopt the rules proposed in this *Further Notice* because it discourages MDU owners from permitting facilities-based competition.

B. Incumbent Operators Rarely Have the Opportunity to Compete Building-by-Building, and the Proposed Rules Will Not Increase Such Competition

The FCC in its Further Notice chastises incumbent franchised cable operators for not cooperating with property owners and alternate providers when they learn that the MDU owner desires to have them expelled from serving the residents of the MDU, even when the cable operator invokes the fact that it possesses various legal rights to maintain its ability to serve the residents of the MDU. According to the FCC, once an MDU owner provides an incumbent cable operator with notice of termination, the cable operator should cooperate completely and “go quietly into that dark night,” whether or not the cable operator has a valid contract or other valid legal reason to stay on the premises and serve the residents of the MDU. Yet, in several places throughout the *Further Notice*, it is noted “that the procedural mechanisms described below would apply only where the incumbent provider no longer has an enforceable right to remain on the premises against the will of the MDU owner.” FN at ¶ 34 (emphasis added); see also FN at ¶ 76. While, it is recognized within the *Further Notice* that contracts between MDU owners and incumbent cable operators “are frequently unclear ... and state and local law as to their meaning is vague,”⁸ the Commission fails to set forth any procedure to resolve these questions. Rather, the *Further Notice* “seek[s] comment on a presumption that the incumbent does not possess an enforceable legal right to maintain its home wiring on the premises (and therefore that our proposed procedures would apply), unless the incumbent can adduce

⁸ While the Cable Operators do not concede that their older contracts are unclear as to providing them with the right to remain on the premises so to service residents of MDUs against the owner’s will, they do note that often the MDU owner and/or the alternate provider often invent arguments that the contract between the incumbent and owner is unclear or provides them with the ability to terminate the incumbent’s legal authority to continue to provide service to the residents of the MDU. Examples are set forth below.

a clear contractual or statutory right to remain.” FN at ¶ 34. Moreover, the *Further Notice* criticizes incumbent cable operators for protecting the integrity of contracts and easements executed by MDU owners, who now desire to be relieved of the obligations set forth in the contracts in order to obtain kick-backs and share revenue with the alternate providers.

Further, the FCC questions why the incumbent franchised cable operator does not “instead respond to competition through varied and improved service offerings.” FN at ¶ 31. The answer is simple — cable operators often do not even know that the MDU owner is negotiating with an alternate provider. When an alternate provider initially enters a new market, its negotiations with MDU property owners are often secretive and the incumbent cable operator often does not discover that negotiations were held until it receives a letter of cancellation or termination of its right to provide service to the residents of the MDU.⁹ Rarely is there a competitive bidding process. The cable operator usually has little or no opportunity to make a counter-offer of better service or rate, and will only be able to continue to serve the residents if it has a legal theory to remain on the premises. Typically, neither the MDU owner nor the alternate provider desire to listen to any contractual, statutory or other legal reasoning, and the only way for the incumbent operator to protect its legal rights is through the courts. While the FCC is correct that litigation will not provide greater competition, often litigation is the only alternative that the incumbent has remaining to protect its rights.

For instance, Comcast is involved in a case in Little Rock, Arkansas where it claims that its contract with the MDU owner provided Comcast with a brief, exclusive period to recoup its investment and then a longer period of service on a non-exclusive

⁹ It is also not unusual for the cable operator to be notified of a switch-over the same day it will take place.

basis. The owner, attempting to obtain a share of the revenue from its tenants from ATI, has taken the position that the contract is terminable, that it has terminated the relationship and that ATI now is the sole provider of such service permitted to serve the MDU. All these dealings were done secretly. Comcast was never offered the opportunity to compete.

The Cable Operators are also aware of a situation in Lubbock, Texas, in which the MDU owner claimed that the contract providing Cox Cable with a right of entry to serve the residents was invalid because the employees who signed the contract did not have the authority to do so. Again, there was no competitive bidding process. Only after a full trial and a jury ruled in Cox Cable's favor holding that the contracts are fully valid and enforceable was Cox able to continue to provide service to the tenants.

C. A Presumption that an Incumbent's Contract Provides it the Legal Right to Maintain Wires on the Premises of an MDU Against the Owner's Wishes is Appropriate

The Cable Operators oppose the presumption that an incumbent does not possess an enforceable legal right to maintain its home wiring unless it can adduce a clear contractual or statutory right, as proposed by the *Further Notice*. There is absolutely no evidence in the record that such a presumption will aid in any significant way toward increasing competition in the MDU video programming service marketplace. However, the Cable Operators contend that there is evidence to show that if an incumbent possesses a contract that allegedly provides for it to have continued access to provide cable service to the tenants, there should exist a presumption that the incumbent has such a legally enforceable right.

One practical proposal is that the rules or procedural mechanism implemented by the FCC should contain a provision that automatically stays these

procedures should any of the parties seek judicial intervention for a determination as to whether the incumbent cable operator indeed has the legal right to remain on the premises against the will of the MDU owner. If the claim is filed early before any self-help occurs¹⁰ or any damages are incurred, the case could simply be one for declaratory judgment, which often can be resolved in a relatively short amount of time — shorter than a normal trial for damages with a request for a jury trial. If the court determines that the cable operator has no such legal right, and after all appeals are exhausted, only then should the proposed time limits set forth in this rulemaking be activated. No cable operator should find itself in the situation of choosing between initiating litigation to protect its legal rights and waiving the rights it may have under the FCC Rules because litigation took longer than the time limits set forth in those Rules.

In fact, Comcast entered into a settlement agreement with one alternate provider in Sarasota, Florida that included a protocol for resolving future disputes over home wiring issues. The protocol included a presumption that if Comcast or its predecessor-in-interest has a contract with a provision stating that it is the owner of the cable wiring within the building, the alternate provider would honor that contract. Moreover, the protocol provides that in the event that Comcast and the alternate provider cannot agree as to Comcast's ownership rights in the wiring, either because it disputes the

¹⁰ Often incumbent cable operators are faced with situations in which, with little or no warning, the alternate provider's employees with bolt cutters and other such equipment, cuts open the incumbent's lock boxes, moves conduit, installs its own lock boxes next to the incumbents and removes all of the home run wiring from the incumbent's lock box to its own newly installed box. All of this occurs without any determination from a court of law or other authority as to who actually owns the home run wires and whether the incumbent has the right to remain on the property. There are many instances where cable operators were forced to obtain preliminary injunctions against such self-help by alternate providers. Presentation at Tabs 9-12.

validity of the contract setting forth Comcast's ownership claim, or disputes the validity of other evidence allegedly setting forth Comcast's ownership claim, the alternate provider may commence a declaratory action in the state circuit court to resolve the issue of the ownership of the wiring. Finally, the parties agreed that pending final resolution of the dispute (either via agreement between the parties, a declaratory action or other method of dispute resolution), the alternate provider would not use the wiring. Since entry of that protocol, Comcast has not had any wiring disputes with that alternate provider. The Cable Operators recommend that the protocol adopted by Comcast in Sarasota be adopted by the Commission to address disputes over inside wiring and continued access to MDUs which are involved in state or federal court litigation.

Thus, while competition between incumbent cable operators and alternate providers may not be as robust as the Commission would desire, the landscape is not littered with as many roadblocks placed by incumbents as this Commission may believe.

III. Statutory Authority

The *Further Notice* states that "Section 624(i) directs the Commission to prescribe rules regarding the disposition of wiring within a subscriber's premises in order to promote consumer choice and competition by permitting subscribers to avoid the disruption of having their home wiring removed upon voluntary termination and to subsequently utilize that wiring for an alternative service." FN at ¶ 56 (emphasis added). Within that Section of the *Further Notice*, the same phrase "promote consumer choice and competition" is used to support the action that the FCC has taken no less than ten (10) times. FN at ¶¶ 56-62. However, nowhere within the *Further Notice* has the FCC demonstrated how **consumer choice** will be increased. To the contrary, the FCC has demonstrated that subscribers, those actually living within MDUs and receiving and

watching the service, will not have any additional choice of MVPD from which they receive their service than they presently have. Under the FCC's Rules, the only one that will have such a choice is the MDU owner, who is making the selection based upon other factors, most important being which company will pay it the most money, either up-front or over the duration of the contract.

It is even recognized in the *Further Notice* that "[a]lthough subscriber choice would be enhanced by the use of multiple wires, we do not believe that requiring MDU owners to permit multiple wires is a viable option at this point in time." FN at ¶ 62.¹¹ The Cable Operators propose that if more time were spent attempting to determine a way to require MDU owners to permit multiple wires, then there might be true consumer choice. Moreover, based upon the access laws in such states as Illinois, New York, New Jersey, and Pennsylvania,¹² such a requirement could easily and legally be drafted.

Consequently, the Cable Operators contend that since the proposed rules set forth by the Commission will not accomplish the goals that Congress has mandated, it does not have the statutory authority to implement such rules. See, e.g., *FCC v. Midwest Video Corp.*, 440 U.S. 689, 708 (1979); *Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997); *American Civil Liberties Union v. FCC*, 823 F.2d 1554, 1570-71 (D.C. Cir. 1987).

¹¹ The *Further Notice* refers back to Section III.A. above for support for this statement. The Cable Operators refer to its comments herein for a rebuttal.

¹² Other States that have enacted access statutes include Connecticut, Kansas, Maine, Massachusetts, Minnesota, Nevada, Rhode Island, West Virginia, Wisconsin, and the District of Columbia.

IV. Constitutional Arguments

Under the limited scenario that the *Further Notice* provides for the proposed Rules to apply only when it is clear that the incumbent provider has no legal or contractual right to remain on the premises of an MDU against the property owner's desire, the Cable Operators would agree that there is no Fifth Amendment taking problem as long as a proper and just compensation formula is implemented. See *supra* at 4 for a discussion on just compensation.

V. The Proposed Procedural Mechanisms for Disposition of Home Run Wiring

A. Building-by-Building Disposition

The *Further Notice* seeks comment on the proposal that:

where the incumbent service provider owns the home run wiring in an MDU and does not (or will not at the conclusion of the notice period) have a legally enforceable right to remain on the premises, and the MDU owner wants to be able to use the existing home run wiring for service from another provider, the MDU owner may give the incumbent service provider a minimum of 90 days' notice that the provider's access to the entire building will be terminated. The incumbent provider will then have 30 days to notify the MDU owner in writing of its election to do one of the following for all the home run wiring inside the MDU: (1) to remove the wiring and restore the MDU to its prior condition by the end of the 90-day notice period; (2) to abandon and not disable the wiring at the end of the 90-day notice period; or (3) to sell the wiring to the MDU owner. FN at ¶ 35.

The Cable Operators find it ironic that the FCC considers that such a proposal will "promote competition and **consumer choice**...." FN at ¶ 2. The Cable Operators fail to see how permitting an MDU owner and/or alternate provider to contract on a building-by-building determination will ever increase **consumer choice**.¹³ By simply permitting an

¹³ Consumer choice will only increase if the MDU owner is considered to be the
(continued...)

alternate provider to take over the home run wiring of the incumbent in order to permit it to be the **sole** provider of service to that MDU, the ultimate user of the service -- the resident or tenant of the MDU — has not gained any choice of service. Thus, once the change is made from the incumbent to the alternate provider of service, if the resident or tenant of the MDU desires to receive service, he or she will still have **only** one choice of providers. No increase in consumer choice has occurred as a result of the proposal in the *Further Notice*. Consequently, all that has occurred is that the alternate provider of service has obtained a subsidy to assist it in making payments to the MDU owner. As stated earlier, the only real winner in the proposal found in the *Further Notice* is the MDU owner.

Next, the *Further Notice* seeks comment on “whether to adopt penalties for incumbent providers that elect to remove their home run wiring and then fail to do so.” FN at ¶ 36. There is absolutely no evidence in the Record that the FCC has pointed to support the statement that this scenario has ever occurred, or that it is a recurring problem. The Cable Operators know of no instance where such a problem as noted in the *Further Notice* has occurred. Thus, a penalty for such action is not at all appropriate.¹⁴

The *Further Notice* next notes that it is the “preference [] to let the parties negotiate the price of the wiring, [and] seeks comment on whether market forces would provide adequate incentives for the parties to reach a reasonable price.” FN at ¶ 37. The Cable Operators believe that the Commission should establish a reasonable guideline or

¹³(...continued)

consumer. However, the Cable Operators believe the consumer is the one who receives, watches and ultimately pays for the service.

¹⁴ To the extent that any such incidents occur, as set forth in ¶ 36 of the *Further Notice*, the alternate provider or the MDU owner can take appropriate legal action to enforce their rights under 47 U.S.C. § 401(b).

formula, should they be required to sell their cable home wire. The Cable Operators believe that the most reasonable formula is one that would be equal to the cost for the alternate provider to install a second home wire, including labor and material costs.¹⁵ This formula would ensure that the alternate provider does not receive a subsidy by obtaining the cable operator's home wire for less than it would normally cost it to install the wire on its own and creates a level playing field to compete for that building. The parties could easily obtain the bids of two different cable installation companies and use those as a basis for the final negotiated payment price. The Cable Operators contend that should such a formula be implemented, the Commission's proposal (that if the parties are unable to negotiate a price within thirty (30) days the incumbent would then be required to elect one of two options between abandonment or removal) (FN at ¶ 38) would be unnecessary.

Thus, a formula should be implemented in order to ensure that the parties can reach an agreement as to the cost of the home run wire.

The Cable Operators agree that from a practical stand-point, the MDU owner appears to be the one in the best position to be the cable operator's "single point of contact". FN at ¶ 76. However, the Cable Operators do not agree that the fact that the MDU owner has the legal right to terminate a cable operator's legal right to provide service to the MDU, "terminating service for the entire building", is equal to "effectively *voluntarily* terminating

¹⁵ "What tends to establish a reasonable value will depend upon the property involved and the circumstances of the case." *J&H Auto Trim Co., Inc. v. Bellefonte Ins. Co.*, 677 F.2d 1365, 1370 (11th Cir. 1982). The principle of unjust enrichment arises "where the labor, services and materials furnished saves the other from expense or loss." *Cato Enters., Inc. v. Fine*, 149 Ind. App 163, 175-76 (Ind. App. Ct. 1971); *Ocean Elec. Co. v. Hughes Laboratories, Inc.*, 636 So. 2d 112, 114 (Fla. 3d DCA 1994) ("to be 'just compensation in money for the property destroyed;' such an amount as will fully restore the loser to the same property *status* that he occupied before the destruction." (emphasis in original)).

service on the subscribers' behalf." *Id.* (emphasis added) The fact that the MDU owner or landlord can terminate a cable operator's right to serve a building does not at all mean that the tenants within that MDU agree to, acquiesce to or even know about the switch-over until after the cable operator is evicted. There are many instances where the MDU owner or landlord had not consulted with the tenants about the decision to switch, or even inform the tenants of the switch until the day that the new alternate provider is about to activate its service. See, e.g., Presentation at Tab 8. Although the MDU owner may have the legal right to terminate and evict the cable operator from its premises, such action should not qualify as "voluntary" termination by the subscriber in order to trigger these Rules.

In *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, Civil Action No. 93-0073-C (W.D. Va. Dec.15, 1993) (Order of Injunction and Findings of Fact), *aff'd.*, 22 F.3d 546 (4th Cir. 1994) (Presentation at Tabs 9 and 10), a federal Magistrate Judge, under 28 U.S.C. § 636(c), found that although the MDU owner had entered into an exclusive agreement with an alternate provider of service, the MDU owner could not permit the alternate provider to simply disconnect all tenants from the incumbent operator and connect to the alternate provider without the tenant's permission. The Magistrate Judge found that the alternate provider "abruptly terminated Adelphia's service to its subscribers within the MDUs without the prior consent of either the tenants of Adelphia." 22 F.2d at 549. The Magistrate Judge entered a preliminary injunction that required the MDU owner to provide a list to Adelphia of all tenants whose leases had not yet expired in order to allow Adelphia to contact those tenants to "ascertain whether the tenant wishes reconnected service with the plaintiff on whatever basis plaintiff wishes to offer reconnection." Presentation at Tab 9 at page 2.

The Cable Operators note that the 30, 60 or 90 days required to conclude certain action as noted throughout the *Further Notice* must have some flexibility for all parties involved. There will certainly be situations, depending on the size of the MDU, that a cable operator will need more time to remove not only its cable home wiring, but its other equipment that it will want to remove from the premises. Additionally, there will be times where the alternate provider may need more time before it is ready to activate its system in order to service the tenants of the MDU. Neither the MDU owner, the landlord nor the alternate provider want the situation where (1) the cable operator notifies the property owner that it will be removing the cable home wiring and other related equipment on the 90th day after termination; (2) the cable operator begins removal as scheduled; yet (3) the alternate provider is not ready to activate its new system, and tenants may face the possibility of being without any service for several days or more. Only cooperation and flexibility will avoid such a scenario.

While the Cable Operators applaud the goals of the *Further Notice*, which are "to promote competition and consumer choice by minimizing potential disruption in service to a subscriber switching video service providers," FN at ¶ 48, that goal will not be fully met as a result of the Rules implemented from the conclusions tentatively set forth therein. The goal of minimizing disruption in service to a subscriber switching providers should be accomplished. The goals of promoting competition will only be partially accomplished, in that these Rules provide for MVPDs to compete building by building to win over the MDU owner. However, these Rules will fail miserably in accomplishing the goal of increased consumer choice. Once the building switches from the incumbent to the alternate provider, the consumer gets no more choice than he or she had before the switch-over.